November 16, 2010

ORAL ARGUMENT NOT YET SCHEDULED

**Nos. 10-5257, 10-5269**

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Greater New Orleans Fair Housing Action Center, *et al.*,
Plaintiffs-Appellants-Cross-Appellees,

v.

U.S. Department of Housing and Urban Development, *et al.*,
Defendants-Appellees-Cross-Appellants.

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**On Appeal from the U.S. District Court for the District of Columbia**
**(D.D.C. Case No. 1:08-cv-01938-HHK)**

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# PLAINTIFFS-APPELLANTS-CROSS-APPELLEES' REPLY BRIEF IN NO. 10-5257 AND RESPONSE BRIEF IN NO. 10-5269

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## CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Plaintiffs-Appellants-Cross-Appellees certify as follows:

### A. Parties

Plaintiffs-Appellants-Cross-Appellees in this matter are the Greater New Orleans Fair Housing Action Center, the National Fair Housing Alliance, and Gloria Burns, Rhonda Dents, Almarie Ford, Daphne Jones, and Edward Randolph, on behalf of themselves and all others similarly situated.

Defendant-Appellee-Cross-Appellant in this matter is Robin Keegan, Director of the Disaster Recovery Unit of the Office of Community Development of Louisiana.

Defendant U.S. Department of Housing and Urban Development ("HUD") is neither an appellant nor an appellee in Case Nos. 10-5257 & 10-5269, as it did not file a response in support of or in opposition to Plaintiffs' two separate motions for preliminary relief that gave rise to the orders appealed in Case Nos. 10-5257 & 10-5269. HUD recently informed this Court it will not file any brief(s) in either case.

## B. Rulings Under Review

1. Order & Memorandum Opinion Denying Plaintiffs' First Motion for a Temporary Restraining Order and Preliminary Injunction, entered on June 29, 2010 and July 6, 2010. *Greater New Orleans Fair Housing Action Center v. U.S. Department of Housing & Urban Development*, 08-cv-01938 (D.D.C. July 6, 2010) (Kennedy, J.).

2. Memorandum Opinion & Order Granting Plaintiffs' Second Motion for a Temporary Restraining Order and Preliminary Injunction, and Denying Defendant Robin Keegan's Motion to Stay Proceedings Pending Appeal, entered on August 16, 2010. *Greater New Orleans Fair Housing Action Center v. U.S. Department of Housing & Urban Development*, 08-cv-01938 (D.D.C. July 6, 2010) (Kennedy, J.).

## C. Related Cases

Case No. 10-5309, is related to Case Nos. 10-5257 & 10-5269. In Case No. 10-5309, Defendant Robin Keegan seeks review of the district court's September 7, 2010 denial in part of her motion to dismiss on the ground of sovereign immunity, as well as (1) the denial of Keegan's Rule 12(b)(6) motion to dismiss based on the district court's holding that Plaintiffs have alleged cause of action under the Fair Housing Act, and (2) the denial of her motion to transfer venue.

On October 6, 2010, Keegan moved to consolidate Case No. 10-5309 with Case Nos. 10-5257 & 10-5269. Doc. No. 1270262. On October 15, 2010, this Court *denied* Keegan's motion to consolidate, holding that "[t]he state immunity issue raised by Keegan in No. 10-5309 has already been raised in No. 10-5257, et al., and consolidation is otherwise not appropriate in the circumstances of this case." Doc. No. 1271822.

On October 7, 2010, Plaintiffs moved to dismiss Case No. 10-5309 as a frivolous appeal whose sole purpose is to obtain interlocutory review over pendent issues for which there is not interlocutory appellate jurisdiction, or in the alternative hold Case No. 10-5309 in abeyance until the first two appeals are decided. Doc. No. 1270358. Plaintiffs' motion is fully briefed and pending before this Court.

## RULE 26.1 STATEMENT

There are no parent companies or publicly-held companies having a 10% or greater ownership interest (such as stock or partnership shares) in the Greater New Orleans Fair Housing Action Center or the National Fair Housing Alliance. The Greater New Orleans Fair Housing Action Center is a private, non-profit civil rights organization dedicated to eradicating housing discrimination throughout the greater New Orleans area through education, investigation and enforcement activities. The National Fair Housing Alliance is a national non-profit organization that works to eliminate housing discrimination and to ensure equal housing opportunity for all people through leadership, education, outreach, membership services, public policy initiatives, advocacy and enforcement.

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# GLOSSARY

| | |
|---|---|
| ACG | Additional Compensation Grant |
| DRU | Disaster Recovery Unit of the Office of Community Development of Louisiana |
| FHA | Fair Housing Act of 1968 |
| HUD | U.S. Department of Housing & Urban Development |
| Keegan | Robin Keegan, Director of the Disaster Recovery Unit of the Office of Community Development of Louisiana |
| LMI | Low- and Moderate-Income |
| LRA | Louisiana Recovery Authority |
| OCD | Office of Community Development of Louisiana |
| Plaintiffs | The Greater New Orleans Fair Housing Act Center, the National Fair Housing Alliance, Gloria Burns, Rhonda Dents, Almarie Ford, Daphne Jones, and Edward Randolph |

## PLAINTIFFS' REPLY BRIEF IN NO. 10-5257

## INTRODUCTION

Defendant Robin Keegan's ("Keegan") response to Plaintiffs' opening brief utterly fails to rebut or undermine Plaintiffs' arguments that the district court erred in denying Plaintiffs' first preliminary injunction ("PI") motion. Accordingly, for the reasons set forth in Plaintiffs' opening brief and this reply brief, this Court should hold the district court erred in denying Plaintiffs' first PI motion.

## PROCEDURAL HISTORY

On August 30, 2010, Plaintiffs filed their opening brief in Case No. 10-5257 ("the first appeal"), an appeal from the denial of Plaintiffs' first PI motion that seeks to preserve at least $148 million in surplus federal Road Home Program funds to reduce continuing racial disparities, should Plaintiffs ultimately prevail on the merits. Plaintiffs' Opening Brief ("Pls. Open."), Doc. No. 1263045.

On September 22, 2010, this Court granted Plaintiffs' emergency motion for an injunction pending appeal, prohibiting Keegan from "committing" the surplus funds "to any new projects, such as the proposed construction lending program, pending disposition of this appeal." Doc. No. 1267355.

## SUMMARY OF ARGUMENT

Keegan's response in this first appeal does not seriously address any of the arguments or authority Plaintiffs' opening brief raises. It offers no argument at all on three of the four preliminary injunction factors—likelihood of success of Plaintiffs' Fair Housing Act ("FHA") claim, irreparable harm, and substantial harm to others. Defendant's Consolidated Brief at 41-47 ("Def. Consol.").

To the extent Keegan addresses the remaining issues in this appeal, she fails to engage in any real analysis or offer contrary legal authority, and cites exclusively to extra-record "evidence" that she never presented to the district court.

For example, while Plaintiffs demonstrated in their opening brief that the district court erred in holding that the Eleventh Amendment forbids the ultimate injunctive relief they seek, Keegan limits her analysis of this issue to a single sentence that "[t]he District Court was correct in [its] holding" that Plaintiffs seek retroactive relief. Def. Consol. 45. And Keegan fails to respond at all to Plaintiffs' legal argument that the Eleventh Amendment is not even implicated because their requested remedy will not impact the state treasury.

Keegan's public interest argument is equally anemic. She fails to defend the district court's findings on this factor and does not address Plaintiffs' argument that courts traditionally treat "eradicat[ing] [] housing discrimination," as an "overriding social priority," especially here where the nation's largest federal housing recovery program continues to violate federal fair housing mandates. Pls. Open. 53-55 (citations omitted).

In sum, Keegan offers no meaningful defense of the district court's underlying decision. For the reasons Plaintiffs offered in their opening brief, therefore, this Court should hold the district court erred in denying Plaintiffs' first PI motion.

## ARGUMENT

### A. Plaintiffs Have Demonstrated They Will Likely Prevail on the Merits

Keegan's response does nothing to undermine Plaintiffs' arguments that the district court (1) correctly held they will likely prevail on the merits of their FHA claim, and (2) erred in holding the Eleventh Amendment bars the ultimate injunctive relief Plaintiffs seek. In fact, Keegan's response does not challenge the district court's findings on Plaintiffs' FHA claim, and provides no analysis or authority to rebut Plaintiffs' Eleventh Amendment arguments.

#### i. The District Court Did Not Abuse its Discretion in Holding Plaintiffs Are Likely to Prevail in Their FHA Claim

In their opening brief, Plaintiffs showed the district court did not abuse its discretion in finding Plaintiffs "'would likely be able to make out th[eir] prima facie case after discovery,' as the 'statistical and anecdotal evidence [Plaintiffs] submit[ted] to the Court leads to a strong inference that, on average, African-American homeowners received awards that fell farther short of the cost of repairing their homes than did white recipients.'" Pls. Open. 26-27 (quoting Dkt. 61 at 8 (July 6, 2010)). This factual finding was not clearly erroneous, as the district court relied on a range of statistical and other documentary evidence that demonstrates how and why African-Americans are more likely than whites in Orleans Parish to receive grants based on pre-storm value and, as a result, are more likely to receive rebuilding grants that fall far short of the cost of repairing their homes. Dkt. 61 at 5-6, 8. Plaintiffs also showed the district court did not abuse its discretion in finding Keegan failed to offer a "'legitimate reason for taking pre-storm values into account in calculating Program awards.'" Pls. Open. 27 (quoting Dkt. 61 at 8).

In her response in the first appeal, Keegan does not address *any* of Plaintiffs' legal or factual arguments on the merits. Incredibly, Keegan's response mentions the merits of Plaintiffs' FHA claim in only two sentences, neither of which argues that the district court erred in its legal or factual conclusions in its July 6 opinion, or that those findings should be reversed. Def. Consol. 45-46.

First, Keegan notes that in her "opposition to Plaintiffs' First [PI Motion], Keegan argued [before the district court] that Plaintiffs . . . could not show a likelihood of success on the merits." *Id*. 43. But Keegan does not even assert, much less explain why, *this Court* should reverse the district court's finding that Plaintiffs will likely succeed on their FHA claim. Second, Keegan states that "even if Plaintiffs are successful on the merits of this case by proving Option 1 of the Road Home Program violates federal law, which is denied, Plaintiffs' remedy must be limited to only prospective injunctive relief[.]" *Id*. 44. But this argument relates to what relief is permitted under the Eleventh Amendment, not the merits of the underlying claim.

Because Keegan does not challenge or analyze in any way the district court's finding that, after an opportunity for discovery, Plaintiffs will likely be able to prove their prima facie case, this Court should hold that the district court did not abuse its discretion in finding that the Road Home formula has a disproportionate affect on African-American homeowners in Orleans Parish.

Although Keegan's opening brief in No. 10-5269 ("the second appeal") challenges the district court's August 16, 2010 decision not to reconsider the factual findings in its July 6 opinion, Def. Consol. 32-36, Keegan has not made (or cross-referenced) those arguments in her response in the *first* appeal, which solely involves the July 6 opinion.[1] Therefore, Plaintiffs' response in the *second* appeal

[1] Nowhere in Keegan's consolidated brief does she argue the district court applied the wrong legal standard or erred in finding that she failed to proffer a legitimate non-discriminatory reason for using pre-storm value. Thus, she has forfeited these issues in both appeals. *McFadden v. Ballard Spahr Andrews & Ingersoll, LLP*, 611 F.3d 1, 6 (D.C. Cir. 2010). Furthermore, her opening brief concedes that to "prevail" on a "disparate impact" claim, Plaintiffs must merely "'offer sufficient evidence to support a finding that the challenged policy actually disproportionately affected a protected class.'" Def. Consol. 32-33 (quoting *2922 Sherman Ave. Tenants Ass'n v. Dist. of Colum.*, 444 F.3d 673, 681 (D.C. Cir. 2006)), without suggesting that Plaintiffs must show any evidence of intentional discrimination.

will address the merits arguments Keegan made *exclusively* in her opening brief in the *second* appeal. *See infra* at 27-39.[2]

### ii. The Eleventh Amendment Does Not Bar the Ultimate Injunctive Relief Plaintiffs Seek

In her response in the first appeal, Keegan argues (1) the Eleventh Amendment bars the type of ultimate injunctive relief Plaintiffs seek, and (2) she enjoys *complete* sovereign immunity from a private party's FHA lawsuit. Def. Consol. 45-46 ("reiterat[ing] her [immunity] arguments" in opening brief). These arguments are without merit.

Keegan offers only a cursory argument that the Eleventh Amendment forbids the type of injunctive relief Plaintiffs seek. *See* Def. Consol. 45-46. Specifically, Keegan wholly fails to respond to Plaintiffs' threshold argument that the Eleventh Amendment poses no bar to relief where, as here, a plaintiff's request for relief will not impact the state treasury. Nor does she respond to any of Plaintiffs' specific arguments or cases that demonstrate their requested relief is prospective.

Moreover, Keegan's argument that she is completely immune from suit is based on a fundamental misunderstanding of *Ex parte Young*, 209 U.S. 123 (1908),

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[2] If this Court considers the merits arguments Keegan makes exclusively in the *second appeal* when it adjudicates the *first appeal*—which it should not do—Plaintiffs incorporate by reference the merits arguments in their response in the *second appeal*. *See infra* at 27-39.

and its progeny. Although Keegan contends *Ex parte Young* is inapplicable because "the state is the real party in interest" and because Louisiana has a "significant sovereign interest" in administering the Road Home Program, *id.* 16-26, these arguments are directly contrary to controlling legal authority.

#### a. Keegan Provides No Analysis or Authority to Challenge Plaintiffs' Argument That the Relief They Seek Is Consistent With the Eleventh Amendment

In their opening brief, Plaintiffs offered two independent arguments why the Eleventh Amendment does not bar the ultimate injunctive relief they seek.

*First*, Plaintiffs argued that, regardless of whether the injunctive relief is prospective or retroactive, the relief is not barred by the Eleventh Amendment because it will not impose a monetary loss on the state or impact the state's budget. Pls. Open. 29. Indeed, it is well-established that where, as here, a plaintiff's request for relief will not impose a monetary loss on the state or impact the state's budget, the Eleventh Amendment poses no bar. *Id*. 29-35.

Because Keegan completely fails to oppose this argument—as she also failed to do before the district court—she has conceded or waived it.[3] *See*

[3] In her opening brief in the second appeal, Keegan notes in passing that Plaintiffs seek "money damages paid from the State treasury." Def. Consol. 15. But she cites nothing to support this proposition. Indeed, Keegan plainly recognizes the Road Home Program is a "federal funded" "federal disaster recovery program," and she wants to use surplus "federal funds" from "Congress' Third Appropriation" to fund a construction lending program. Dkt. 57 at 8-9, 18, 15, 36; *see also* Def. Consol. 43.

*McFadden*, 611 F.3d at 6 (failure to address issue in first appellate brief results in issue waiver, *and* failure to raise issue in district court results in issue forfeiture) (citations omitted). Accordingly, Keegan has failed to prove her sovereign immunity defense on the scope of the relief Plaintiffs seek.[4]

*Second*, Plaintiffs argued in their opening brief that the Eleventh Amendment poses no bar to such relief because it is prospective, as the remedy they seek will bring an end to Keegan's "present violation[s] of federal law." *Papasan v. Allain*, 478 U.S. 265, 278 (1986); Pls. Open. 35-46. Plaintiffs seek an order requiring Keegan to stop violating federal law and to use the remaining surplus funds (which Congress earmarked solely for Road Home recipients) to reduce or eliminate current disparities in the ongoing Road Home Program so all homeowners receive *final* non-discriminatory rebuilding grants. Pls. Open. 39-41. Remedying ongoing unequal distribution of rebuilding grants is "'precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Ex parte Young*.'" *Id.* 41 (quoting *Papasan*, 478 U.S. at 266).

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[4] "The defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a[n] [] exception to immunity." *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000); *accord Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 238-39 (2d Cir. 2006) ("circuit courts . . . have unanimously concluded that 'the entity asserting Eleventh Amendment immunity has the burden to show that it is entitled to immunity.'" (quoting *Gragg v. Ky. Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002)); *Christy v. Pa. Turnpike Comm'n*, 54 F.3d 1140, 1144 (3d Cir. 1995); *ITSI T.V. Prods., Inc. v. Agric. Ass'ns*, 3 F.3d 1289, 1291 (9th Cir. 1993).

In her consolidated brief, Keegan fails to provide any real analysis of the Eleventh Amendment doctrine, and does not attempt to distinguish or rebut any of the cases upon which Plaintiffs rely—cases that demonstrate the relief Plaintiffs seek is entirely prospective. *See id.* 39-44. In fact, Keegan's entire "argument" on the issue of prospective relief is limited to paraphrasing the district court's ultimate conclusion that Plaintiffs request "impermissible retroactive monetary relief," Def. Consol. 45 (citing Dkt. 61 at 9-15), and asserting that "[t]he District Court was correct in this holding." *Id.* Keegan's failure to cite a single case contrary to Plaintiffs' legal authority and her failure to defend the district court's flawed reasoning in any detail leaves the underlying decision seriously in question.

Furthermore, while Keegan asserts—based solely on a declaration that should be rejected because it was not presented to the district court, *see infra* at 11 n.7—that the Road Home Program is not "an ongoing program where Keegan has authority to modify the formula and spend surplus funds," she undermines this argument by admitting that "changes to the existing Road Home formula" *can* be made "via an Action Plan Amendment" that receives "approval by HUD." Def. Consol. 46. In other words, if HUD approves Action Plan Amendment 43, Keegan can supplement homeowners' initial grants with the surplus funds. *See* Pls. Open.

13-16.[5] There should be no question, therefore, that initial grants are routinely subject to modification.

Finally, Keegan suggests there are no "surplus funds" for the court to preserve. Def. Consol. 46-47. But this contention is belied by the documentary evidence and Keegan's own representations before the district court that there *is* a surplus of at least $100 million to $148 million that Keegan wants to spend on a construction lending program. *See* Dkt. 50 (June 2, 2010), Ex. J at 2, Ex. Z at 1-2, Ex. aa at 2-3, Ex. bb ¶ 5; Dkt. 69 at 28 (Aug. 4, 2010).[6] Furthermore, this contention is based solely on Keegan's declaration that she filed in *this Court* several weeks ago to "present new evidence" during this appeal. Doc. No.

[5] Contrary to Keegan's suggestion, Plaintiffs do not contend that Keegan can "unilaterally" change the formula and supplement grants. Def. Consol. 46. As Plaintiffs have previously described, Keegan "has the authority to change the grant formula in order to supplement or modify the *initial* grants that it provides to homeowners as long as . . . *HUD approves the altered formula*." Pls. Open. 13 (emphasis added). Consequently, Plaintiffs' Complaint named both Keegan and HUD as defendants.

[6] *See also* Dkt. 57 at 36 ("Action Plan 43 [the construction lending program] is proposed to be funded by $100 million remaining in the third [appropriation], after reserve set aside of $554.5 million dollars [sic] for remaining grant awards and appeals."); Dkt. 69 at 28 ("[f]ollowing budgeted amounts for payment of homeowner compensation grants, additional compensation grants, elevation incentive grants, . . . among others, *there remains from [the third] appropriationapp roximately* [sic] $150 million which is restricted by law for use in the Road Home Program."). Furthermore, the suggestion there is no surplus is contrary to the district court's opinion, which was premised on the fact that there *is* a surplus of Road Home funds. Dkt. 61 at 5. Otherwise, there would be no need to consider whether surplus funds could be lawfully deployed as a remedy in this action. *See id.* at 5, 9-15.

1271932 ¶ 6 (Oct. 15, 2010). As Keegan's declaration was not before the district court when it issued the two orders that are the subject of these consolidated appeals, this Court must disregard it.[7]

For all these reasons, the district court erred, as a matter of law, in holding that the Eleventh Amendment bars the ultimate injunctive relief Plaintiffs seek.

**b. Keegan's Argument on Complete Sovereign Immunity is Barred By Controlling Precedent**

Keegan provides two reasons why she believes the Eleventh Amendment provides her with complete immunity from suit by private parties under the FHA: (1) the state of Louisiana, and not Keegan, is the real party in interest and *Ex parte Young* is therefore inapplicable; and (2) *Ex parte Young* is inapplicable because Louisiana has a "significant sovereign interest" in administering the Road Home Program. Def. Consol. 21-26. Both of these arguments are based on a flawed

[7] This Court does not consider an affidavit presented for the first time *after* the district court has issued an order that is subject of an appeal, as "it is well established that the obligation of th[e] Court [of Appeals] is to look at the record before the District Court at the time it [decided] the motion [that is the subject of the appeal], not at some later point." *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1035-36 (D.C. Cir. 1988) (collecting cases); *accord United States ex rel. Settlemire v. District of Columbia*, 198 F.3d 913, 920 (D.C. Cir. 1999) (refusing to consider a supplemental declaration filed in D.C. Circuit after appeal was lodged). As "[a]n appellate court has no fact-finding function," "[i]t cannot receive new evidence from the parties, determine where the truth actually lies, and base its decision on that determination." *Goland v. CIA*, 607 F.2d 339, 371 (D.C. Cir. 1979). To introduce new evidence, the "proper procedure . . . is for [Keegan] to move for relief from the judgment in the district court under [Federal] Rule 60(b)," not to file a new declaration in this Court. *Id.*

interpretation of *Ex parte Young* and should be rejected.

Keegan's attempt to argue the state is the "real party in interest" rings hollow. Indeed, in its order on Plaintiffs' first PI motion, the district court dismissed this entire argument in a footnote, correctly explaining that "the *Ex parte Young* exception to sovereign immunity permits suits against state officers by relying on 'the fiction that the suit [goes] against the officer and not the State[.]'" Dkt. 61 at 9 n.8 (quoting *Vann v. Kempthorne*, 534 F.3d 741, 749 (D.C. Cir. 2008)). In its subsequent ruling on Keegan's motion to dismiss, the district court again rejected this argument, recognizing that "[c]ases analyzing and applying the doctrine established in *Ex parte Young* do not inquire into the state officer's personal actions or responsibility for the alleged violation of federal law by an agency, and, by extension, a state." Dkt. 77 at 8 (Sept. 7, 2010) (citing *Verizon Md., Inc. v. Public Service Comm'n of Md.*, 535 U.S. 635, 645 (2002)).

Similarly, this Court recently rejected Keegan's exact argument in *Vann*, 534 F.3d 741, a case that Keegan fails to distinguish and cites only for the proposition that her sovereign immunity defense is entitled to *de novo* review. *See* Def. Consol. 17. In *Vann*, plaintiffs brought suit against the Cherokee Nation, an entity worthy of tribal sovereign immunity, arguing its voting procedures were discriminatory. 534 F.3d at 745. In response, defendants argued that plaintiffs' suit "really runs against the tribe itself." *Id.* at 750. Dismissing this argument, this

Court recognized, *inter alia*, that (1) unlike the case relied on by defendants, in which a federal officer "was only alleged to have breached a contract, the tribal officers in our case are said to have violated the Thirteenth Amendment;" and (2) the plaintiffs' "suit falls squarely within the principle of *Ex parte Young*," because the requested injunction would only "prevent the [tribe's Chief] from exercising . . . authority in violation of [federal law]." *Id.* at 751, 754. Indeed, the court reasoned that the tribe's argument "is reminiscent of the losing argument in *Ex parte Young*," which "is no more persuasive a century later." *Id.* at 750.

Like the *Vann* plaintiffs, Plaintiffs here argue Keegan has violated federal law[8] and seek an injunction preventing Keegan from exercising her authority in violation of federal fair housing law.[9] In short, Keegan erroneously "imagines a world where *Ex parte Young* suits cannot proceed if they will have any effect on a

[8] Keegan argues Plaintiffs fail to allege she has done anything illegal. Def. Consol. 23. This is incorrect. Plaintiffs named Paul Rainwater, Keegan's predecessor, as a defendant in his official capacity. In their Complaint, Plaintiffs seek relief from Defendants' violations of federal fair housing laws. Compl. at 16-17. Because Keegan is now a defendant in this case, Plaintiffs have adequately alleged *she* is responsible for violations of federal fair housing law.

[9] Keegan argues she does not have authority to implement the relief Plaintiffs seek, Def. Consol. 23-24, but as the district court recognized, "Keegan's underlying premise regarding her responsibilities appears to be incorrect. As HUD notes . . . the Louisiana statute governing the LRA provides that the agency's Executive Director's 'powers, duties, and functions' include '[t]o discharge all operational, administrative, and executive functions of the authority.'" Dkt. 77 at 8-9 n.11 (quoting La. Rev. Stat. Ann. § 49:220.5(D)(2)).

sovereign. But that is what *Ex parte Young* suits have always done." *Id.* at 754.

Keegan's second argument, that this case implicates "significant state interests," and, therefore, *Ex parte Young* is inapplicable, is similarly without merit. Def. Consol. 25. Keegan cites *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), to support her argument, but both cases are inapposite.

In *Seminole Tribe*, the Supreme Court considered the constitutionality of the Indian Gaming Regulatory Act's ("IGRA") remedial provision, which made a state subject to suit by an Indian tribe in federal district court if the state failed to negotiate in good faith towards a Tribal-State compact. 517 U.S. at 49-50. First, the Court held the Eleventh Amendment bars Congress from authorizing suits by private parties against un-consenting states under the Indian Commerce Clause. *Id.* at 72. Second, the Court held the plaintiff tribe could not use the *Ex parte Young* exception to the Eleventh Amendment to enforce the IGRA against a state official. The Court based its decision, however, on the principle that "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right . . . in suits against federal officers" the Court has "refused to supplement that scheme with one created by the judiciary." *Id.* at 74. Relying on *Schweiker v. Chilicky,* 487 U.S. 412 (1988), and similar authority, the Court observed that the intricate, limited remedial scheme Congress had devised under the IGRA gives rise to an inference that Congress did not intend to make state officials liable for violations of this law under *Ex parte Young*. *Id.* at 75.

Unlike the state official in *Seminole Tribe,* Keegan has not identified (and cannot identify) Congress's enactment of a limited remedial scheme that application of *Ex parte Young* to this case would disrupt. Indeed, a judgment against Keegan would require no further remedy than prospective injunctive relief, which the FHA clearly contemplates as an appropriate remedy. *See* 42 U.S.C. § 3613(c) (in a civil action by a private person for violations of the FHA, the court "may grant as [it] deems appropriate, any permanent or temporary injunction"). As the FHA does not supply a "detailed remedial scheme" like in *Seminole Tribe*, any argument of Congressional intent to displace *Ex parte Young* here falls flat. *See Vann*, 534 F.3d at 755 (rejecting *Seminole Tribe* argument because defendants could not identify statute limiting remedies available against them); *Rosie D. ex. rel. John D. v. Swift*, 310 F.3d 230, 236-37 (1st Cir. 2002) (holding *Seminole Tribe's* exception to *Ex parte Young* did not apply because Medicaid Act contained no comprehensive set of remedies and evinced no congressional intent to foreclose other remedies).[10] In fact, Congress intended that private attorneys general, like the Plaintiffs here, would serve as the "primary method of obtaining compliance"

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[10] *See also Mo. Child Care Ass'n v. Cross*, 294 F.3d 1034, 1038 (8th Cir. 2002); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1110 n. 34 (E.D. Cal. 2002).

by parties, like Keegan, who violate the FHA. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972).

Keegan's reliance on *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), to support her claim that this case implicates significant state interests is similarly misplaced. In *Coeur d'Alene* the plaintiff Indian tribe alleged ownership of the Coeur d'Alene lake's banks and submerged lands, as well as rivers and streams that formed part of its water system. 521 U.S. at 264. The Court found the tribe's requested relief, to essentially quiet title to the land, would "divest the State of its sovereign control over submerged lands, lands with a unique status in the law." *Id.* at 283. Concluding *Ex parte Young* could not apply, the Court explained, "if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its treasury." *Id.* at 287.

However, since *Coeur d'Alene*, the Supreme Court has emphasized that in determining whether *Ex parte Young* applies, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md.*, 535 U.S. at 645 (quoting *Coeur d'Alene*, 521 U.S. at 296).

This and other circuits have correctly read the Court's reasoning in *Coeur d'Alene* to be addressed to the unusual facts presented by that case. *Vann*, 534

F.3d at 756 (refusing to apply *Coeur d'Alene* to tribal officials accused of violating federal law and noting "we cannot extend *Coeur d'Alene* beyond its 'particular and special circumstances' . . . which involved the protection of a State's land." (quoting *Coeur d'Alene*, 521 U.S. at 287); *Ind. Protection and Advocacy Servs. v. Ind. Family and Soc. Servs. Admin.*, 603 F.3d 365, 372 (7th Cir. 2010) (Supreme Court "turned away from the [*Coeur d'Alene*] balancing approach in *Verizon Maryland*"); *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 912-13 (10th Cir. 2008) (noting *Verizon Maryland* limited *Coeur d'Alene*, and rejecting its application to case where plaintiffs sought declaratory judgment and injunction preventing defendants from enforcing an unconstitutional law).

As the district court properly concluded, there is "nothing extraordinary" about this case. Dkt. 77 at 9. Plaintiffs do not request relief of the kind in *Coeur d'Alene*, which uniquely implicated special sovereign interests in public lands. Keegan's interest in controlling the disbursement of *federal* grant money to hurricane victims is notably less compelling than the "historical pedigree" of Idaho's interest in its submerged lands and waterways, "carefully set forth" in *Coeur d'Alene*. *Vann*, 534 F.3d at 756. Rather, a straightforward inquiry, as *Verizon Maryland* directs, shows Plaintiffs simply allege a violation of federal law and seek only prospective injunctive relief.

### B. Keegan Does Not Deny That Thousands of Plaintiffs Will Suffer Irreparable Harm Without the First Preliminary Injunction

In their opening brief, Plaintiffs argued the district court erred in holding Plaintiffs would not face irreparable harm without an injunction freezing the surplus federal Road Home funds, because its holding was based on the district court's erroneous legal conclusion that it "'may not order the [ultimate] relief plaintiffs seek'" for homeowners who *previously received initial grants* and instead may only provide relief to several hundred homeowners who have *not yet received initial grants*. Pls. Open. 48 (quoting Dkt. 61 at 15).

Because of its legal error, the district court failed to consider whether, in the absence of a preliminary injunction preserving at least $148 million in surplus funds, 9,500 Orleans Parish homeowners who have received initial grant awards based on pre-storm value would lose the ability to obtain final non-discriminatory grants "'if [the Plaintiffs] should eventually prevail on the merits.'" *Id*. 47 (quoting *Ambach v. Bell*, 686 F.2d 974, 986 (D.C. Cir. 1982)).

Keegan's response does not address irreparable harm *at all*. Accordingly, she does not defend the district court's irreparable harm finding, dispute that it was an abuse of discretion, or rebut Plaintiffs' argument that without preliminary relief they will suffer irreparable harm by forever being deprived of the ultimate relief they seek in this action.[11]

Because the district court failed to consider Plaintiffs' simple argument on irreparable harm due to its prior legal error, and because Keegan fails to rebut Plaintiffs' arguments, this Court should hold the district court clearly abused its discretion by finding Plaintiffs will not suffer irreparable harm.

### C. Keegan Fails to Defend the District Court's Erroneous Conclusions on Substantial Harm to Others or to Address Plaintiffs' Arguments

In their opening brief, Plaintiffs offered five arguments why the district court erred in holding that a preliminary injunction freezing approximately $148 million in surplus funds would significantly restrict and delay Keegan's ability to provide rebuilding assistance to homeowners and, thus, cause harm to non-Plaintiffs.

First, Plaintiffs argued that the first PI they sought would not prevent Louisiana from accomplishing any of its currently planned activities, as the preliminary relief would only freeze *surplus* funds. Pls. Open. 50.

Although Keegan's response does not directly address the issue of substantial harm to others, her cursory analysis on the public interest factor alleges that "Plaintiffs' requested relief would result in a 'freeze' of all federal funds dedicated to the Road Home Program, leaving the affected and eligible citizens of

[11] Nor does Keegan address Plaintiffs' argument that, by losing the opportunity to receive non-discriminatory final grants, many homeowners would lose their homes altogether. Pls. Open. 47.

Louisiana without any further resources until the completion of this litigation." Def. Consol. 44. But this contention is contradicted by the undisputed record evidence and the district court's understanding that Plaintiffs' first PI motion only sought to freeze *surplus* funds, not *all* Road Home funds.

In Plaintiffs' memorandum in support of their first PI motion, Plaintiffs made clear they only sought to preserve "surplus funds"—the funds HUD has not yet obligated to Louisiana and Louisiana has not committed for specific purposes. Dkt. 58 at 4-6 (clarifying Plaintiffs only seek to freeze surplus funds and stating "[Keegan] should be permitted to make *all* payments to eligible grant recipients from previously-committed funds, such as . . . $126.6 million for pending eligible grant applications."). Moreover, in denying Plaintiffs' first PI motion, the district court stated that "plaintiffs seek a preliminary injunction enjoining Keegan from spending any surplus funds—that is, Program funds not already designated for the remaining 179 Option 1 awards, ACGs, or any other specific use—until the merits of their case are resolved." Dkt. 61 at 5. Accordingly, Plaintiffs' first PI motion will not freeze *all* Road Home funds, as Keegan seems to contend.

Plaintiffs offered four additional arguments why no other parties would suffer substantial harm: (1) a delay in the disbursement of surplus funds will not cause harm because this action can be resolved long before Keegan's lending program is implemented, Pls. Open. 50-51; (2) mere delay, as a matter of law, in the use of these surplus assets is insufficient to deny the PI because Plaintiffs will suffer irreparable harm, *id.* 51-52 & n.23; (3) as Keegan was made aware of the discriminatory impact of the grant formula long ago, she voluntarily incurred any possible harm, *id.* 51-52; and (4) the court applied the wrong legal standard by failing to consider whether others would be *substantially* injured. *Id.* 49 n.21.

Keegan fails to respond to these arguments or otherwise defend the district court's findings on this factor. As Plaintiffs demonstrated that the district court erred by finding others would be harmed by freezing the surplus funds and Keegan failed to demonstrate otherwise, this Court should hold the preliminary relief Plaintiffs seek will not substantially harm third parties.

**D. Keegan Does Not Deny the Public Interest Favors Remedying One of the Largest Ever FHA Violations**

In their opening brief, Plaintiffs demonstrated the district court abused its discretion in holding the "public interest in an injunction does not weigh in favor of either party." Dkt. 61 at 16; *see* Pls. Open. 53-55. Keegan does not contend otherwise.

First, Plaintiffs argued there is no basis in the record to conclude the preliminary relief Plaintiffs requested will "cause significant delay in the distribution of Program funds." Dkt. 61 at 15-16; Pls. Open. 53. Keegan's response does not defend this finding or address the issue of delay.

Next, Plaintiffs argued that, while the district court correctly acknowledged the "strong public interest in preventing discrimination," it failed to recognize the "highest priority" and "overriding social priority" of "eradicat[ing] [] housing discrimination," especially here where the district court has found discrimination in the nation's largest federal housing recovery program ever. Pls. Open. 53-55 (citations omitted).[12]

Keegan's response does not challenge this argument or the district court's conclusion on the importance of remedying housing discrimination. Instead of addressing Plaintiffs' arguments or the district court's findings, Keegan mischaracterizes the relief Plaintiffs seek in their first PI motion as freezing "all federal funds dedicated to the Road Home Program," and claims that such an injunction would "leav[e] the affected and eligible citizens of Louisiana without further resources until the completion of this litigation." Def. Consol. 44. As Plaintiffs explain fully above, this argument is completely contrary to the record evidence and the district court's own finding. *See supra* at 19-20. There is simply no evidence that Plaintiffs' requested relief will stop Keegan from making any payment required by the program as she designed it.

[12] Keegan also does not dispute that courts often conclude that "eradicating housing discrimination takes precedence over a variety of government regulations, initiatives and goals." *Id*. 54 (collecting cases).

Subsequently, when Keegan briefly addresses sovereign immunity, she makes reference to her proposed construction lending program. While Keegan asserts in her extra-record declaration[13] that the lending program would "assist some of the Option 1 applicants who face serious challenges to their rebuilding efforts," Def. Consol. 46 (citing Keegan Decl. ¶ 12-13), Keegan does not argue the public interest would be furthered by spending the surplus funds on this program. In fact, nowhere does Keegan specifically explain how or when she would spend the surplus funds.[14] Accordingly, Keegan does not offer any basis in the record—or in the new evidence she improperly presents, *see supra* at 11 n.7—to conclude the public interest would be advanced by giving Keegan access to the surplus funds now, rather than permitting Plaintiffs (and similarly situated homeowners) to

[13] Relying solely on a declaration that must be disregarded as it was never presented to the district court, *supra* at 11 n.7, Keegan's response vaguely refers to "additional programs" she is now undertaking "to help achieve the goal of compensating displaced homeowners and helping them return home following the hurricanes." Def. Consol. 46 (citing Keegan Decl. ¶¶ 12-13). But her declaration does not state whether any surplus funds *would* be spent on these "additional programs." Keegan Decl. ¶ 12. For instance, an additional program is funded by $750 million from FEMA. *Id.* ¶ 12(b). Other programs, such as "rental assistance," *id.* ¶ 12(c), cannot be lawfully funded through the Road Home Program, as Congress mandated the final $3 billion appropriation could only be spent on *homeowners'* claims. *See* Pls. Open. 7-8 (describing strict limitations imposed on these federal funds).

[14] Keegan does not address why she has failed to submit a detailed formal construction lending proposal for HUD's approval, why homeowners would benefit from receiving *loans* instead of *grants* Congress authorized in the final appropriation, and whether the final appropriation even authorizes loans. *See* Pls. Open. 7-8, 18, 50-51.

receive larger non-discriminatory, final grants through an expeditious resolution of this action.

For all of these reasons, this Court should hold the district court abused its discretion in finding the public interest factor does not favor either party.

## CONCLUSION

For the reasons stated in Plaintiffs' opening and reply briefs, this Court should hold the district court abused its discretion in denying Plaintiffs' *first* PI motion, vacate that order, and remand with instructions to grant Plaintiffs' motion.

*** * ***

## **PLAINTIFFS' RESPONSE BRIEF IN NO. 10-5269**

## **INTRODUCTION**

When the district court denied Plaintiffs' first PI motion on July 6, 2010, it held the Eleventh Amendment bars the court from providing injunctive relief that would benefit any homeowners who had already received *initial* rebuilding grants. Dkt. 61 at 9. The Court noted, however, that its Eleventh Amendment holding does not apply to homeowners who have *not yet received* initial grants. *Id.* at 14 n.12, 15 n.13. Following that ruling, Plaintiffs promptly filed a second PI motion seeking narrower relief to protect the rights of homeowners who had not yet received initial grants. Dkt. 62 (July 21, 2010). On August 16, 2010, the district court granted Plaintiffs' second PI motion, prohibiting Keegan from issuing any *future initial* rebuilding grants based on pre-storm value. Dkt. 72 at 1-6.

In her appeal of the August 16 order, Keegan argues that this Court should vacate the preliminary injunction for several reasons. First, Keegan argues the Eleventh Amendment grants Keegan complete immunity from suit under the FHA. Second, Keegan challenges the district court's jurisdiction to hear Plaintiffs' second PI motion. Third, Keegan challenges Plaintiffs' standing to bring this lawsuit. Finally, Keegan argues the district court erred in applying the four preliminary injunction factors. Def. Consol. 2-4. As demonstrated below, Keegan's arguments ignore or misconstrue key facts, and contravene controlling case law. Therefore, this Court should hold the district court did not abuse its discretion in granting Plaintiffs' second PI motion.

## JURISDICTION

Plaintiffs incorporate the jurisdictional statement in their opening brief, Pls. Open. 4-5, which applies to Keegan's timely appeal in No. 10-5269.

## STATEMENT OF STATUTES & REGULATIONS

Pertinent statutes are set forth in an addendum to Plaintiffs' opening brief.

## STATEMENT OF ISSUE

The issue in No. 10-5269 is whether the district court correctly granted Plaintiffs' second PI motion.

## STATEMENT OF FACTS

Plaintiffs incorporate the facts in their opening brief. *Id*. 5-21.

## SUMMARY OF ARGUMENT

The district court correctly granted Plaintiffs' second PI motion barring Keegan from prospectively using her discriminatory formula when making future initial rebuilding grants. The district court also correctly held it had jurisdiction to consider Plaintiffs' second PI motion, as it sought limited relief for a narrower group of putative class members than Plaintiffs' first PI motion.

## STANDING

Plaintiffs address standing *infra* at 49-57.

## ARGUMENT

### A. The District Court Correctly Held Plaintiffs Will Likely Prevail on the Merits

#### i. The District Court Did Not Abuse its Discretion in Declining to Reverse Its Prior Finding That Plaintiffs Will Likely Succeed on the Merits of Their FHA Claim

In granting Plaintiffs' second PI motion on August 16, the district court "[found] no reason to reconsider its [prior] ruling" that "plaintiffs have submitted sufficient evidence to show that they would likely be able to make out a prima facie case," "especially where Keegan has still provided neither evidence contradicting plaintiffs' contentions nor an explanation of the reason for taking pre-storm home values into account." Dkt. 72 at 3-4. Therefore, the district court held "plaintiffs will likely be able to show after discovery that the Option 1 formula is unlawful." *Id.* at 4.

The district court did not abuse its discretion in concluding Keegan offered no reason to reconsider its prior finding.[15] First, the court did not commit a clear error in finding "Keegan has *still*" not provided "evidence contradicting plaintiffs' contentions[.]" *Id.* at 3 (emphasis added). In its prior decision on Plaintiffs' first

[15] The standard of review in this second appeal is the same as in the first appeal, as both review preliminary injunction orders. *See* Pls. Open. 24-25.

PI motion, the court found "unpersuasive" Keegan's "attacks on [Plaintiffs'] evidence," and criticized Keegan for failing to "provide[] data about the administration of the Program that would show what effect the Option 1 formula has had." Dkt. 61 at 8. Although Keegan had sole control over data on Road Home grants, Keegan did not disclose the relevant program data or offer an analysis of that data in her opposition to Plaintiffs' second PI motion.

Instead, Keegan proffered the declaration of a labor economist, Janet R. Thornton, which solely criticized Plaintiffs' reliance on a report by the non-profit group PolicyLink, repeating almost verbatim the same arguments about the report the district court rejected as unpersuasive in its July 6 opinion. *Compare* Dkt. 69 at 21-25 & Ex. 1, *with* Dkt. 57 at 23-28 (June 14, 2010). Indeed, Thornton admits the sole purpose of her declaration is "to review and assess the 2008 [PolicyLink] report," not to analyze Road Home Program data or rebut any other evidence Plaintiffs proffered. Dkt. 69, Ex. 1 ¶ 3.

Second, the court's finding that Keegan, *for a second time*, failed to provide a legitimate non-discriminatory reason for using pre-storm value, is not clearly erroneous. Dkt. 72 at 4. Nowhere in Keegan's opposition did she offer "an explanation of the reason for taking pre-storm home values into account," *id.* at 4, let alone a non-discriminatory reason. In any event, Keegan has forfeited this issue by not raising it on appeal. *McFadden*, 611 F.3d at 6.

### ii. Keegan's Arguments Attacking the Evidence of Discrimination the District Court Credited Are Meritless

In her opening brief in the second appeal, Keegan offers several arguments why the district court abused its discretion when it refused, in its August 16 opinion, to reverse its prior finding that Plaintiffs will likely prevail in their FHA claim. Def. Consol. 32-36.[16] Keegan's arguments are all meritless and provide no basis whatsoever to conclude the district court abused its discretion when it reaffirmed its prior factual finding.

*First*, Keegan argues that "to prevail" on their FHA disparate impact claim, Plaintiffs "'must offer sufficient evidence to support a finding that the challenged policy actually disproportionately affected a protected class,'" Def. Consol. 32-33 (quoting *2922 Sherman Ave.*, 444 F.3d at 681), which she claims can only be shown by an expert analysis of statistical evidence comparing the impact of the adverse policy on the relevant populations. *Id*. 33.

This argument misrepresents the burden of proof at the preliminary injunction stage. By ignoring the early procedural stage of Plaintiffs' motion, Keegan incorrectly assumes Plaintiffs are required to prove the ultimate merits of their claim in a preliminary injunction motion, even though discovery has not yet commenced. As a result, Keegan fails to recognize the crucial distinction between

[16] Nowhere in Keegan's consolidated brief does she challenge the legal standard the district court applied. *See supra* at 5 n.1. Thus, she has forfeited that issue. *See McFadden*, 611 F.3d at 6.

the proof required for a preliminary injunction and that required at a trial on the merits. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 603-04 (1984) ("[A] determination of a party's entitlement to a preliminary injunction is a separate issue from the determination of the merits of the party's underlying legal claim, and . . . a reviewing court should not confuse the two.").[17] While Keegan cites two cases addressing the burden of proof in a disparate impact action, neither involves a preliminary injunction motion and both expressly state the burden of proof for *proving the ultimate merits* at trial or summary judgment.[18]

In its initial ruling on the likelihood of success, the district court squarely rejected Keegan's misleading legal authority on Plaintiffs' burden of proof, explaining that "Plaintiffs need not make a showing at this stage of the proceedings, before discovery and when briefing is necessarily rushed, sufficient to prove the merits of their case." Dkt. 61 at 8. In opposing Plaintiffs' second PI

[17] As this Court noted in another civil rights action where plaintiffs sought preliminary relief, "the traditional equitable standard" for a preliminary injunction merely requires the movant to "show a substantial likelihood of success on the merits," not prove the actual merits. *Reynolds v. Sheet Metal Workers, Local 102*, 702 F.2d 221, 223 (D.C. Cir. 1981).

[18] *See 2922 Sherman Ave.*, 444 F.3d at 681 (reviewing jury verdict and discussing standard to "prevail on a disparate impact claim") (citing *Allen v. Seidman*, 881 F.2d 375 (7th Cir. 1989) (reviewing post-bench trial verdict)); *Menokan v. Blair*, 2006 WL 1102809, at *1-2 (D.D.C. Apr. 26, 2006) (denying summary judgment motion and applying "burden-shifting framework" "to prove disparate impact") (internal quotations and citation omitted).

motion, Keegan repeated the same misleading authority. Dkt. 69 at 20. And now, on appeal, Keegan does not even argue the district court erred in rejecting this argument.[19]

Keegan is not only wrong about Plaintiffs' burden of proof at this early stage. She also ignores the record below when she asserts Plaintiffs have not "submitted any admissible statistical evidence." Def. Consol. 33. In fact, the district court credited *two* forms of statistical evidence: (1) the PolicyLink report that analyzed data on the Road Home grants statewide and in Orleans Parish;[20] and

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[19] In a footnote, Keegan offers an unpersuasive argument that Plaintiffs must use a "standard deviation" analysis to identify a statistically significant disparity. *See* Def. Consol. 33 n.25. But as this and other courts have concluded in FHA disparate impact cases, a standard deviation analysis—which compares how a particular group actually fared to how it would be expected to fare without discrimination (e.g., how many African-Americans obtained housing compared to how many applied)—is inapposite in the disparate impact context, which compares the relative percentages of African-Americans and whites who were adversely impacted by the policy. *See Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 577 (2d Cir. 2003) (holding Plaintiffs could make out FHA disparate impact claim that a local fire department code adversely affected recovering addicts by showing percentage of recovering addicts who need to live in a group setting is greater than percentage of non-recovering addicts who need to live in a group setting); *2922 Sherman Ave.*, 444 F.3d at 681 (citing *Allen*, 881 F.2d at 378-80 (plaintiffs proved prima facie case by showing 84% of white candidates passed exam compared to 39% of black candidates)).

[20] In fact, *statistical experts* prepared the 2008 PolicyLink report, and Keegan's predecessor selected PolicyLink to undertake the study, obtain exclusive access to the data, and work closely with Keegan to publish the report. Keegan could review and comment on the report "prior to any release of any findings," and PolicyLink's results were compared with Keegan's figures to "check the accuracy of the data." Dkt. 58, Ex. 1 ¶¶ 9-11.

(2) Census data on home values in Orleans Parish (reported through tables and maps of predominantly African-American and white neighborhoods). Dkt. 61 at 5-6. This evidence, in conjunction with numerous forms of anecdotal evidence, *id.*, provided a broad and deep range of factual support for the district court's factual finding on the disproportionate affect the use of pre-storm value has on African-American homeowners in Orleans Parish.[21]

*Second*, Keegan argues the district court "erred by disregarding the factual declarations" she proffered in opposition to Plaintiffs' *second* PI motion, though not in opposition to the first PI motion. Def. Consol. 33-34. Although Keegan introduced three declarations, only Thornton's Declaration actually addressed Plaintiffs' evidence of discrimination.[22] Contrary to Keegan's argument, however, the district court did not abuse its discretion in refusing to credit the Thornton

[21] Keegan argues Plaintiffs "fail to recognize that the Road Home Program is a state-wide program" and "when they do submit appropriate evidence, it will need to be on a state-wide level." Def. Consol. 33. But Keegan offers no authority that, as a matter of law, Plaintiffs cannot challenge the disparate impact of a statewide policy on the homeowners in a specific geographic location, such as a county, and Plaintiffs are aware of none.

[22] In her opening brief, Keegan asserts the court erred when it allegedly "disregard[ed]" Lara Robertson and Robin Keegan's Declarations in considering whether Plaintiffs would likely prevail on the merits. Def. Consol. 33. This is a frivolous argument, as the section of Keegan's brief addressing Plaintiffs' likelihood of success *did not cite to or ask the court to consider* these declarations. *See* Dkt. 69 at 21-25. Moreover, these declarations did not attempt to contradict any evidence of discrimination Plaintiffs had proffered (including the PolicyLink report). *Id.* Ex. 2-3.

Declaration. *See* Dkt. 72 at 4 ("Keegan has still [not] provided [] evidence contradicting plaintiffs' contentions"). Thornton's Declaration does nothing more than repeat the same "unpersuasive" arguments about the PolicyLink report that Keegan made in opposition to Plaintiffs' first PI motion. Dkt. 61 at 8. It certainly does not provide the data on the Road Home Program grants needed to perform a statistical analysis that would permit either party to prevail at trial or summary judgment. Indeed, as this Court has held, "a defendant cannot rebut statistical evidence by mere conjectures or assertions, without introducing [its own] evidence." *Palmer v. Shultz*, 815 F.2d 84, 101 (D.C. Cir. 1987); *see also Segar v. Smith*, 738 F.2d 1249, 1287 (D.C. Cir. 1984); *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 653-54 (5th Cir. 1983).

Keegan's first argument based on the Thornton Declaration is that the PolicyLink study "is based on incomplete and faulty data," because the study analyzed data that was available on June 26, 2008 and therefore analyzed only 70% of the initial grants that have now been awarded. Def. Consol. 34 & n.26.

While Keegan insists the study would be invalid unless it evaluates the most recent and complete available data, Keegan did not proffer any program data or offer an analysis of such data to the district court, although she alone possesses that data and has hired a purported statistical expert. Furthermore, Keegan fails to point to any evidence to suggest the latest 30% of overall initial grants she has awarded since June 26, 2008 have eliminated the gross disparities PolicyLink revealed.

Next, based on the Thornton Declaration, Keegan argues the PolicyLink study does not consider Additional Compensation Grants ("ACGs") up to $50,000 and uncapped ACGs as part of the overall grant awards provided to low- and moderate-income ("LMI") homeowners. Def. Consol. 34-35. By providing uncapped ACGs to LMI homeowners—starting in January 2010—Keegan guaranteed that *all* LMI homeowners could receive grants based on the cost of repairing their homes (up to $150,000, the maximum grant), and none should be limited to grants based on pre-storm value. *See* Pls. Open. 14-15.

Contrary to Keegan's assertion, however, the PolicyLink study *expressly stated that it considered ACG awards* up to $50,000. Dkt. 50, Ex. S at 41, 60. And while Keegan argues her decision to provide uncapped ACGs reduced the sizeable measured disparities between the relevant African-American and white populations, she does not offer any data or analysis to demonstrate the extent to which it may have been reduced. At any rate, the ACG awards clearly did not ameliorate all of the discrimination evident in the program.

*Third*, Keegan asserts the district court should not have credited the 2000 Census data as showing racial disparities in the value of homes between African-Americans and whites in Orleans Parish. Specifically, Keegan argues the Census "was taken five years prior to Hurricane Katrina" and the creation of the Road Home Program. Def. Consol. 35. This argument fails for several reasons. As Keegan did not raise the issue of Census data in her opposition to Plaintiffs' second PI motion, *see* Dkt. 69 at 18-25, she has waived the issue. *McFadden*, 611 F.3d at 6. Furthermore, the 2000 Census data is the most recent data on home value by Census tract in Orleans Parish *prior to Hurricane Katrina*, and Keegan does not assert there is more recent or accurate data to measure *pre-storm home values*. Moreover, the Supreme Court has held "[t]he use of census data is an appropriate method of demonstrating discrimination," *Capaci*, 711 F.2d at 653 (citing *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977)), and Keegan has not offered any contrary authority that Census data is unreliable. And Keegan cannot dispute that Census data demonstrates racial disparities, as her predecessor "told [Congress] that home values in African-American neighborhoods tend to be lower than in white neighborhoods[.]" Dkt. 61 at 6. At any rate, Keegan's argument is disingenuous, as her own expert relied on Census data to support Keegan's arguments. *See* Dkt. 69, Ex. 1 at 5 nn.12-13.

*Fourth*, Keegan actually argues her own program may have unfairly disadvantaged whites who own homes with more expensive amenities. According to Keegan, because her formula based the estimated cost of damage on what it would cost to "repair a modest home," "[t]he more luxurious the amenities in the home, the more significant the disparity between the home's actual damage and the amount allowed." Def. Consol. 35.

This argument is absurd. Several years ago, Keegan adopted rules for ascertaining the cost to rebuild a home under Option 1. *See* Dkt. 50, Ex. L at 5. Now that she has issued over 117,000 initial grants based on those very rules, Keegan cannot in good faith claim she has inaccurately estimated the cost of damage to these homes.

Moreover, Keegan has offered no evidence to demonstrate the actual impact of the rule that Option 1 grants cover the cost of rebuilding a home with "modest" amenities. In fact, her opening brief does not cite to any evidence in the record to support her argument. And any potential marginal effect of estimating the cost of damage based on modest amenities pales in comparison to the enormous disparities individual African-American homeowners continue to face as a direct result of Keegan's discriminatory formula. For example, Plaintiff Almarie Ford received an initial grant of only $1,399 based on the pre-storm value of her home; but she will receive a *final* grant of $150,000 if her final grant is based on the estimated cost of damage to her home. *Id.* Ex. U ¶¶ 4-7; *see also id.* Ex. V ¶¶ 5-8 (same).

*Fifth*, Keegan asserts, without support, that "Plaintiffs' disparate impact argument is based on an assumption that when non-African American homeowners received their Road Home disbursements, they were 'made whole.'" Def. Consol.

35. This allegation is false and has no basis in the record. Plaintiffs have never claimed anyone is "made whole" by receiving a rebuilding grant that is capped at $150,000.[23] Instead, Plaintiffs' disparate impact claim has always been based on the fact that a higher share of African Americans than whites in Orleans Parish have received *grants based on pre-storm value*, which are always less likely to defray the cost of home rebuilding than *grants based on the estimated cost of damage*.

As a higher share of African Americans in Orleans Parish received grants based on pre-storm value, African Americans are more likely to face sizeable gaps in resources needed to rebuild their homes. Compl. ¶¶ 54-57. This is exactly what the district court found in its July 6 opinion, Dkt. 61 at 8, and reaffirmed in the August 16 order now on appeal. Dkt. 72 at 3-4. In other words, Plaintiffs simply claim they should be accorded the same treatment as tens of thousands of other

[23] In fact, at the hearing on Plaintiffs' first PI motion, Plaintiffs' counsel noted the PolicyLink report shows *all* homeowners who received initial grants based on cost of damage had an average gap of $14,000 in the resources needed to rebuild. But homeowners who received initial grants based on pre-storm value faced a much higher average gap of $50,000 in the resources needed to rebuild, placing them in an inferior position to homeowners who received grants based on cost of damage. Tr. at 22 (describing Dkt. 50, Ex. S at 43). According to Keegan's predecessor, African-Americans are disproportionately more likely to face this latter situation because they "are more likely to receive [a grant based on] pre-storm value." Dkt. 50, Ex. N. at 23-24.

homeowners who have received initial grants based on the cost of repairing their homes up to $150,000.

*Sixth*, Keegan asserts the district court erred by crediting Carol Johnson's Declaration[24] and not granting Keegan's motion to strike, which claimed Johnson is "not an expert economist or statistician." Dkt. 61 at 6 & n.7 (quoting Keegan Opp'n at 29 n.20). *See* Def. Consol. 36. But Keegan has not shown the district court abused its discretion in doing so.[25] Keegan failed to raise this issue in her opposition to Plaintiffs' *second* PI motion and, thus, has waived it for the purpose of her *second* appeal. *McFadden*, 611 F.3d at 6. Similarly, as Keegan's response fails to challenge the district court's July 6 order that Keegan briefed this issue "in less detail than is necessary for the Court" to grant her motion, Dkt. 61 at 6, she has forfeited the issue. *Id.*

Moreover, contrary to Keegan's contentions, Johnson's Declaration provides a detailed explanation of her qualifications and a basis for her personal

[24] In its July 6 opinion on Plaintiffs' first PI motion, the district court stated Johnson is "president of a Louisiana mortgage company, who asserts she has expertise in the mortgage industry and that she has 'observed that because of the formula employed, Road Home Program grant calculations result in homeowners in predominantly African American areas received lower grant awards than homeowners in predominantly White areas.'" Dkt. 61 at 6 (quoting Ex. T ¶ 7).

[25] *Maldonado v. United States Bank*, 186 F.3d 759, 768 (7th Cir. 1999) (noting that a "motion to strike" an affidavit is "review[ed] for abuse of discretion"); *Hambleton Bros. Lumber Co. v. Balkin Enters.*, 397 F.3d 1217, 1224 n.4 (9th Cir. 2005) (same).

observations about how the formula disadvantaged African-Americans in Orleans Parish. Dkt. 58, Ex. 2 ¶¶ 1-11 (describing decades of experience, review of Census data, and observations). Finally, even if Johnson's Declaration were disregarded, it should not impact this court's review of the district court's factual finding on likelihood of success, as the Court noted its finding does not depend on Johnson's Declaration. Dkt. 61 at 6 n.7. Indeed, her testimony primarily corroborates the other statistical and anecdotal evidence Plaintiffs proffered.

#### iii. The Eleventh Amendment Does Not Bar the Narrow Preliminary Relief Plaintiffs Obtained in The Second Motion

As the district court has held several times, no sovereign immunity concerns exist with respect to homeowners who have not yet received initial rebuilding grants. Dkt. 72 at 4 ("Plaintiffs' current motion . . . only seeks an injunction that would allow them to ultimately obtain the limited relief the Court explained . . . it has jurisdiction to provide.").[26] The second PI motion is limited to homeowners who have not yet received *initial* rebuilding grants. As the district court recognized, Plaintiffs' second motion merely asked the district court "to enjoin Keegan from disbursing initial Road Home Program awards to Option 1 applicants

[26] *See also* Dkt. 77 at 10 ("As to any individuals who have not yet received initial awards of Option 1 grants, the case may go forward and plaintiffs may seek a permanent injunction that, like the preliminary injunction now in place, prohibits Keegan from calculating Option 1 grants based on the pre-storm value of a home.").

using a formula that takes into account the pre-storm value of an individual's home." *Id.* at 2.

Moreover, in her opposition to Plaintiffs' second PI motion, Keegan effectively conceded the Eleventh Amendment does not bar the district court from granting preliminary relief to homeowners who have not yet received initial grants. *See* Dkt. 69 at 26. While Keegan argued that 38 applicants who had recently received initial grants could not receive preliminary relief, she noted there are 141 homeowners who have not yet received initial Option 1 grants and did not argue that the Eleventh Amendment precludes the court from granting them preliminary relief. *Id.* Accordingly, the district court did not address (nor should it have) sovereign immunity in its decision on Plaintiffs' second PI motion.

As Keegan failed to raise before the district court a sovereign immunity defense regarding homeowners who have not yet received initial grants,[27] Keegan waived this argument, *McFadden*, 611 F.3d at 6, and has failed to provide any defense regarding homeowners whom the August 16 order benefits.

In sum, the August 16 order provides only prospective injunctive relief that is consistent with the Eleventh Amendment.

[27] Nor did Keegan's opposition raise her *complete* sovereign immunity defense before the district court. To the extent this Court chooses to address it in the second appeal, Plaintiffs incorporate all Eleventh Amendment arguments in their opening and reply briefs in the first appeal, including their arguments on complete immunity. *See* Pls. Open. 27-46; *supra* at 6-17.

### B. The District Court Correctly Held Homeowners Who Have Not Yet Received Initial Grants Would Face Irreparable Harm

Plaintiffs need not show irreparable harm is certain; they must only "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council*, 129 S. Ct. 365, 375 (2008).

In its ruling on Plaintiff's *first* PI motion, the district court held the Eleventh Amendment bars the court from awarding any injunctive relief that would benefit Plaintiffs who had already received *initial* rebuilding grants. Dkt. 61 at 9-15. While Plaintiffs contend this holding is legally erroneous and challenge it in the first appeal, if this Court affirms the district court's Eleventh Amendment analysis then the district court correctly held homeowners who had not yet received initial awards "would face irreparable harm" in the absence of the second PI. Dkt. 72 at 4.

Under the district court's erroneous Eleventh Amendment analysis, "as Keegan continues to distribute awards, homeowners who receive them [would] lose their ability to challenge what plaintiffs allege is a racially discriminatory formula." *Id*. Therefore, without a preliminary injunction, Keegan's harmful discrimination would be permanently locked in place—even if the court were to ultimately hold the formula is unlawful—and a number of Plaintiffs would forever lose the opportunity to obtain larger non-discriminatory, final grants they need to rebuild.

In her opening brief, Keegan does not challenge the district court's rationale regarding irreparable harm, and instead argues she has adequate funds on reserve to pay the maximum grant to all Plaintiffs who have not yet received initial grants. Def. Consol. 37.

This argument fails to address the district court's holding that once Keegan issues an initial grant based on a home's pre-storm value, the district court could not order Keegan to reduce continuing disparities for homeowners who have already received initial grants.[28] It is simply irrelevant that Keegan would have sufficient funds to make non-discriminatory final grants to these Plaintiffs, if the Court cannot order her to do so. Accordingly, the district court did not abuse its discretion in finding irreparable harm to homeowners who have *not yet received initial grants*.[29]

Moreover, when plaintiffs have demonstrated a substantial likelihood that a defendant is violating a fair housing statute or regulation—as Plaintiffs have done

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[28] Keegan's opposition to the second PI motion actually *supported* the holding below on irreparable harm, as she admitted that after the July 6 opinion denying Plaintiffs' first PI motion, she continued to use the discriminatory formula to issue initial grant awards for at least *38 homeowners* and argued that, under the district court's Eleventh Amendment analysis, they could no longer secure an order entitling them to non-discriminatory, final grants. Dkt. 69 at 26.

[29] *See In re Feit & Drexler, Inc.*, 760 F.2d 406, 416 (2d Cir. 1985) (observing federal courts have found irreparable harm and granted preliminary relief where it is evident defendant would frustrate a judgment on the merits) (citations omitted); *Republic of Philippines v. Marcos*, 806 F.2d 344, 356 (2d Cir. 1986).

here—there is a rebuttable presumption of irreparable injury. *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423-24 (11th Cir. 1984) ("[O]nce a plaintiff has demonstrated the likelihood of success on the merits of a claim of housing discrimination, irreparable injury must be presumed"); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) (same); *Rogers v. Windmill Pointe Village Club Ass'n, Inc.*, 967 F.2d 525, 528-29 (11th Cir. 1992) (same); *Mical Commc'ns, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1035-36 (10th Cir. 1993) (collecting cases from Sixth, Seventh, and Eighth Circuits).

### C. The District Court Correctly Held a Narrow Preliminary Injunction Would Not Cause Substantial Harm to Other Interested Parties

As the district court correctly held, there is simply no credible argument that Keegan or any other interested parties will suffer *substantial* harm from a preliminary injunction merely enjoining Keegan from continuing to issue *initial* grants based on pre-storm value. Dkt. 72 at 4.

In support of her claim to the contrary, Keegan raises a series of meritless arguments, each of which is equally lacking in factual or legal support.

Keegan disingenuously claims the district court's August 16 order caused substantial delays in administration of the Road Home Program.[30] She

[30] The only support Keegan cites on delay is her own *new* declaration that must be disregarded as it was never presented to the district court. *See supra* at 11 n.7.

inexplicably argues the August 16 order *required* her to halt almost all payments to Road Home beneficiaries, including beneficiaries under Options 2 and 3 of the Road Home Program, though neither option is at issue in this litigation. Def. Consol. 38. But any alleged delay was solely caused by Keegan's own misreading of the district court order. *See* Dkt. 78 (Sept. 16, 2010); Dkt. 82 (Sept. 27, 2010); Dkt. 83 (Sept. 29, 2010).

First, the narrowly crafted preliminary injunction does not require Keegan to halt *any* payments. Instead, it simply prohibits Keegan from using the discriminatory pre-storm value criterion in issuing any future initial grants. *See* Dkt. 72 at 1-6. As the district court made clear, the injunction *permits* Keegan to continue issuing initial grants to homeowners under Option 1, if she relies on a non-discriminatory alternative to pre-storm value. *Id.* Regrettably, rather than making all future initial grants on a non-discriminatory basis, Keegan responded to this order by halting all *initial* grants for homeowners who would receive initial grants based on pre-storm value under the current formula. Def. Consol. 13. Thus, any delay was caused by Keegan, not the August 16 order.

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Even in that declaration, Keegan merely states she is "aware of Road Home applicants who would prefer to 'opt out' of this litigation," but fails to state how many requests she received and fails to describe or produce the contents of such requests. *See* Doc. No. 1271932 ¶¶ 15-16. Moreover, Keegan's statement that she "is aware" of such requests cannot be used to prove that anyone actually complained, as it is inadmissible hearsay.

Second, contrary to Keegan's overly broad reading of the August 16 opinion and order, the PI was clearly limited to Option 1 and specifically disavowed any impact on other program components. Dkt. 72 at 4-6. And the record shows that, when presented with an opportunity to clarify any ambiguity in the August 16 order, Keegan refused to join Plaintiffs and HUD in seeking clarification, and then actively litigated the issue in an effort to prevent clarification. Dkt. 78, 82-83, 84 (Oct. 4, 2010). As such, any delays were of Keegan's own design.

At any rate, it is now clear no payments need be delayed at all. Although the district court denied Plaintiffs' motion for clarification, it explained that Plaintiffs' narrow interpretation of the August 16 opinion and order was correct, and rejected Keegan's overly broad interpretation. Dkt. 84 at 1-3. And Keegan admits she resumed making thousands of payments months ago. Def. Consol. 12-13. Thus, Keegan has failed to demonstrate harm to anyone.

### D. The District Court Correctly Held the Public Interest Weighs in Favor of Relief For Homeowners Who Have Not Received Initial Grants

The district court correctly held the public interest supports Plaintiffs' second PI motion, as it will "remedy housing discrimination." Dkt. 72 at 5. In their opening and reply briefs in the first appeal, Plaintiffs fully describe the public interest in eradicating housing discrimination and ensuring public funds are spent pursuant to Congressional directives. Pls. Open. 53-55; *supra* at 22 & n.12.

Keegan's opening brief in the second appeal does not challenge the district court's finding that remedying housing discrimination advances the public interest. Thus, she has forfeited this issue. *McFadden*, 611 F.3d at 6.

Instead, citing solely to a declaration that must be disregarded, *supra* at 11 n.7, Keegan contends the second PI will "freeze the assets of the Road Home Program," and thereby prevent her from carrying out her "proposed construction lending program" to offer loans to thousands of homeowners. Def. Consol. 40-41. But this contention is obviously false, as the August 16 order did not freeze *any* funds. Instead it simply barred Keegan from continuing to make dozens of future initial grants based on pre-storm value, while permitting Keegan to make those future initial grants on a non-discriminatory basis. *See* Dkt. 72 at 1-4; Def. Consol. 13.

As Keegan's only argument lacks any foundation and she fails to assign any error to the district court's public interest finding, this Court should not disturb that finding.

### E. The District Court Had Jurisdiction Over Plaintiffs' Second Motion

Keegan argues the district court lacked jurisdiction over the second PI motion because Plaintiffs had already taken an interlocutory appeal of the district court's denial of their first PI motion. Def. Consol. 26.

But the district court *did* have jurisdiction over Plaintiffs' second PI motion, because the "second motion [sought] different relief than did the first," Dkt. 72 at 2, and the second motion sought relief intended to maintain the status quo by preserving the claims of a distinct, smaller group of putative class members than the group contemplated by the district court in its ruling on the first PI motion. *Compare* Dkt. 61 at 14 n.12, 15 n.13, *with* Dkt. 72 at 1; *see* *Nat. Res. Def. Council v. Southwest Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001).

Although Keegan accurately notes that "filing of a notice of appeal . . . 'divests the district court of control over those aspects of the case involved in the appeal,'" *United States v. DeFries*, 129 F.3d 1293, 1302 (D.C. Cir. 1997) (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam)), "[t]he principle of exclusive appellate jurisdiction is not, however, absolute[.]" *Southwest Marine*, 242 F.3d at 1166 (internal citations omitted).

"The district court retains jurisdiction during the pendency of an appeal to act to preserve the status quo." *Id*. In fact, Federal Rule of Civil Procedure 62 codifies this exception to exclusive appellate jurisdiction, *see id.*, expressly permitting a district court to "suspend, modify, restore or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c).

In Plaintiffs' second PI motion, the issue before the *district court* was distinct from the issues before *this Court* in Plaintiffs' first appeal regarding their first PI motion. Thus, the district court had jurisdiction to consider other matters. *See Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 565-66 (7th Cir. 2000) (emphasizing narrow scope of *Griggs* rule as applied to preliminary injunction appeals). As the district court correctly noted, Plaintiffs' first motion sought to enjoin "Keegan from spending any *surplus funds*—that is, *Program funds not already designated for the remaining 179 [initial] Option 1 awards, ACGs, or other specific use*" to ensure that homeowners who have already received grant awards can obtain injunctive relief. Dkt. 61 at 5 (emphasis added). In contrast, the district court correctly recognized Plaintiffs' second PI motion only sought "to enjoin Keegan from disbursing initial Road Home Program awards to Option 1 applicants using a formula that takes into account the pre-storm value of an individual's home." Dkt. 72 at 2.

Moreover, the only case cited by Keegan that actually involves a preliminary injunction appeal is *Decatur Liquors, Inc. v. District of Columbia*, 2005 WL 607881 (D.D.C. Mar. 16, 2005). But that case is inapposite, as there the defendants had appealed the grant of a preliminary injunction and simultaneously filed a motion to dissolve the same preliminary injunction. *Id.* at *1 (district court was "divested of jurisdiction to consider in parallel a motion for the same relief" as defendants sought in the appeal).

In direct contrast, here Plaintiffs' second motion requested a different type of relief on behalf of a distinct subgroup of putative class members, and could have no impact on the first appeal. Indeed, the only persons whose rights were at issue in the second motion were homeowners whom the district court explicitly exempted from its prior decision denying Plaintiffs' first PI motion. *See* Dkt. 61 at 10, 14 n.12, 15 n.13. Accordingly, by granting Plaintiffs' second motion, the district court simply protected the rights and remedies available to the only individuals whose rights were *not* at issue in the appeal regarding the first PI motion.

## F. Plaintiffs Have Standing to Bring This Action

Keegan asserts that none of the Plaintiffs has standing to bring this action. Def. Consol. 27-31. This argument is completely without merit and should be rejected.

### i. The Individual Plaintiffs Have Standing

To establish standing, a plaintiff must meet three requirements: (i) that she has suffered an "injury in fact," (ii) that there is a causal connection between that injury and the defendant's actions, and (iii) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision" from the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations and citations omitted).

When a defendant objects to a plaintiff's standing to bring an action for the first time on appeal, as Keegan does here, this Court applies the same lenient standard a district court would apply in considering a motion to dismiss, where "general factual allegations of injury resulting from the defendant's conduct may suffice[.]" *Abigail Alliance for Better Access to Dev. Drugs v. Von Eschenbach*, 469 F.3d 129, 132 (D.C. Cir. 2006) (panel rehearing); *see also Nat'l Coal Ass'n v. Hodel*, 825 F.2d 523, 526-27 (D.C. Cir. 1987); *accord Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.") (internal quotations and citation omitted)).

Here, the Complaint unequivocally establishes that each of the five individual Plaintiffs—Gloria Burns, Rhonda Dents, Almarie Ford, Daphne Jones, and Edward Randolph (collectively "Individual Plaintiffs")—has standing to bring this action. Each owns a home in New Orleans that was "catastrophically damaged by Hurricane Katrina and the subsequent flooding." Compl. ¶¶ 13-17. Each applied to the Road Home Program under Option 1 and received an initial rebuilding grant based on the pre-storm value of their homes that falls woefully short of the amount needed to repair the damages they suffered. *Id*. ¶¶ 61-65.

These injuries, far from being "conjectural," are undeniably "concrete," "actual," and "particularized," *Lujan*, 504 U.S. at 560, as the Individual Plaintiffs, given the size of the initial grants they received, have been unable to complete rebuilding their homes.

Moreover, the Complaint identifies a direct causal relationship between Individual Plaintiffs' injuries and Keegan and HUD's discriminatory actions. It alleges that each plaintiff would receive a substantially larger grant if his or her rebuilding grant is based on the cost of damage to his or her home, and not the racially discriminatory pre-storm value criterion. *Id.*

Finally, the relief requested in this litigation, including an injunction preventing Keegan from continuing to use the discriminatory pre-storm value formula and requiring Keegan to make all final grants on a non-discriminatory basis, will directly redress the Individual Plaintiffs' continuing injuries. *Id*. at 17 & ¶ 7.

In contesting the Individual Plaintiffs' standing, Keegan neither challenges any of the aforementioned factual allegations nor denies the injury suffered by each homeowner. Rather, the only argument she musters is that *two* of the *five* Individual Plaintiffs, Gloria Burns and Daphne Jones, have received, after the filing of the Complaint, ACGs that raised their rebuilding grants to $150,000, the maximum grant amount. Def. Consol. 29. But it is well established that "[st]anding is assessed 'at the time the action commences.'" *Advanced Mgmt. Tech., Inc. v. F.A.A.*, 211 F.3d 633, 636 (D.C. Cir. 2000) (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000)). When the Complaint was filed, *all* of the Individual Plaintiffs had standing to bring this action, because they all had received initial grants based on pre-storm value.[31]

**ii. The Organizational Plaintiffs Have Standing**

Next, Keegan asserts the two organizational plaintiffs—the Greater New Orleans Fair Housing Action Center and the National Fair Housing Alliance (collectively "Organizational Plaintiffs")—lack standing because they "are not homeowners [sic] applicants to the Road Home Program and they have suffered no injury which would entitle them to relief." Def. Consol. 15. Not only is this argument clearly rebutted by the facts the Complaint alleges, but it also is contravened by well-established jurisprudence on organizational standing.

The Supreme Court has recognized "[t]here is no question that an association may have standing in its own right to seek judicial relief from injury to

[31] Keegan contends the Individual Plaintiffs waived their right to sue under the FHA by agreeing in advance to the Road Home Program's dispute resolution process. Def. Consol. 29 n.22. This argument is meritless, as that dispute resolution process is expressly limited to reviewing challenges to grant awards and eligibility, and expressly disclaims any authority to resolve claims brought under federal law. *See* Dkt. 34 at 58-59.

itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). To establish organizational standing, organizations must meet the same three requirements as individuals. *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (citation omitted).

On appeal, Keegan limits her challenge to the injury-in-fact requirement.[32] Here, the Complaint alleges the Organizational Plaintiffs, just like their individual counterparts, suffered concrete, actual, and particularized injuries. In the aftermath of Hurricanes Katrina and Rita, GNOFHAC and NFHA, two non-profit fair housing organizations, created the Hurricane Relief Project, through which they have "expended a substantial amount of time and resources representing the interests of homeowners, home seekers[.]" Compl. ¶ 68. But because of the discriminatory pre-storm value formula used by Keegan to award rebuilding grants, the Organizational Plaintiffs have been compelled to devote their scarce resources to identifying, assisting, and educating Orleans Parish homeowners adversely affected by that formula, as well as educating public officials about the racially discriminatory impact of Keegan's actions. *Id*. ¶¶ 69-73.

[32] Keegan does not dispute the Complaint pleads sufficient facts to satisfy the other two standing requirements. Nor could she, as the Organizational Plaintiffs' continuing injuries flow directly from Keegan's conduct and will cease when Plaintiffs obtain the ultimate relief they seek. *See* Compl. ¶¶ 69-73.

Courts have repeatedly held these exact types of injuries are sufficient to demonstrate organizational standing. In *Havens Realty*, the Supreme Court held Housing Opportunities Made Equal (HOME), a non-profit corporation, satisfied the injury in fact requirement because the complaint alleged HOME's ability to provide "counseling and referral services for low-income and moderate-income homeseekers" was "perceptibly impaired" as a result of defendant's racial steering practices. 455 U.S. at 379.

Similarly, in *Spann*, this Court held two organizations had standing where they alleged that, as a result of the defendants' racially discriminatory advertisements, they had to devote their resources to providing increased educational and counseling services to minority homebuyers. 899 F.2d at 28-29. As the injuries the Organizational Plaintiffs allege are indistinguishable from those suffered by organizations in *Havens Realty* and *Spann*, and the Complaint's allegations directly track the allegations that were sufficient in *Haven Realty*,[33] this Court should hold that the Organizational Plaintiffs have organizational standing.

[33] *Compare Havens Realty*, 455 U.S. at 379 (plaintiffs satisfied standing by alleging "Plaintiff HOME has been frustrated by defendants . . . in its efforts to assist equal access to housing through counseling and other referral services," and "had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices"), *with* Compl. ¶¶ 70-71.

### iii. The District Court's August 16 Preliminary Injunction Should Not Be Limited to the Representatives of the Putative Class

Keegan's final argument challenging Plaintiffs' standing is that "Plaintiffs have failed to demonstrate standing because there is no certified class[.]" Def. Consol. 31. Keegan's argument should fail for several reasons.[34]

First, Keegan does not cite any legal authority to show how Plaintiffs' *standing* is implicated in any way by a *class certification determination* that, pursuant to a court-approved agreement by the parties, has not even been filed in the district court.[35] As discussed above, each Individual and Organizational Plaintiff has met all standing requirements under Article III of the Constitution. The fact that a class has not yet been certified does not deprive them of standing.

Second, as Keegan failed to raise this argument before the district court in opposing Plaintiffs' second PI motion—*and it does not implicate standing*—this Court should not consider it. *See McFadden*, 611 F.3d at 6.

Third, Keegan has not identified any controlling authority—based on standing or any other legal principle—to challenge Plaintiffs' ability to seek preliminary relief designed to protect the interests of other members of the putative

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[34] Keegan's alleged standing argument challenges the granting of Plaintiffs' second PI motion, but does not suggest this argument applies to the relief Plaintiffs' first PI motion seeks.

[35] Nearly two years ago the district court granted a joint stipulation to delay class certification briefing until "six months from the commencement of discovery," Dkt. 16 (Feb. 11, 2009), and discovery has not yet commenced.

class. While it is true that some courts have restricted injunctive relief to class representatives where there is no certified class, *see* Def. Consol. 30-31, this Court has issued no such bar. Federal courts in other circuits have held that "[d]istrict courts are empowered to grant preliminary injunctions 'regardless of whether the class has been certified.'" *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1178 n.14 (N.D. Cal. 2009) (quoting Schwarzer, Tashima, and Wagstaffe, Federal Civil Procedure Before Trial, § 10:773 at 10-116 (TRG 2008)); *see also McGlothin v. Connors*, 142 F.R.D. 626, 641 (W.D. Va. 1992) (same) (citing *Sandford v. Coleman Realty Co.*, 573 F.2d 173, 178 (4th Cir. 1978)). In fact, courts have granted such relief where, as here, potential class members will likely suffer irreparable harm if the court fails to offer injunctive relief before ruling on the merits.[36]

Furthermore, despite Keegan's assertion to the contrary, the district court's August 16 preliminary injunction is fully consistent with Rule 65(d) of the Federal Rules of Civil Procedure, which states that an order providing preliminary injunctive relief can only bind "the parties; the parties' officers, agents, servants, employees, and attorneys[.]" The district court's August 16, 2010 preliminary

[36] *See Olson v. Wing*, 281 F. Supp. 2d 476, 486-87 (E.D.N.Y. 2003) (granting preliminary relief that was necessary to ensure all putative class members continued to receive potentially life-saving medical treatment and medications); *Reynolds v. Guiliani*, 35 F. Supp. 2d 331, 333 (S.D.N.Y. 1999) (granting in part plaintiffs' preliminary injunction motion prior to class certification where putative class members threatened with losing food stamps and other assistance).

injunction binds *only* Keegan, who is undeniably a party in this action. Putative class members are in no way restricted or enjoined by the August 16 order.

In short, the Complaint sets forth sufficient allegations to establish the standing of all Plaintiffs to bring this action, and the district court did not err in granting Plaintiffs' second PI motion to protect the rights of homeowners who have not yet received initial grant awards.

## CONCLUSION

For all the reasons stated above, this Court should affirm the district court's grant of Plaintiffs' second PI motion.

Dated: November 16, 2010

Respectfully submitted,

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Dated: November 16, 2010

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**CERTIFICATE OF SERVICE**

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